Supreme Court, U.S.
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No. 98-1654

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN R. CARLETON, *et al.*,
Petitioners,

v.

CITY OF TULSA, OKLAHOMA, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1998

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Tenth Circuit Court of Appeals erred in holding that this Court's decision in *County of Sacramento* v. Lewis, 118 S.ct. 1708 (1998), precluded a finding that Respondents Hanley and McSlarrow violated Petitioners' substantive due process rights.

II. Whether the Tenth Circuit Court of Appeals erred by holding Petitioners could not maintain an action against the City of Tulsa for directly violating their substantive due process rights through the execution of the City of Tulsa's own policies, practices and customs after the Court found Petitioners did not suffer a constitutional deprivation.

III. Whether the Petitioners produced sufficient proof to create a genuine issue of material fact with respect to whether the actions of the individual officers and/or the municipality violated the Petitioners' substantive due process rights.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request this honorable Court deny the petition for certiorari sought by the Petitioners seeking review of the decision denying them relief by the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The opinions and orders previously entered in this action are appropriately set out in the Appendix to the Petitioners' petition.

THE PETITION FOR WRIT SHOULD BE DENIED

The purpose of the extraordinary remedy of certiorari is to offer a limited review of a cause that has been decided by the highest court of last resort before presentation to this Court. Certiorari should only be granted when the case under review clearly presents a situation indicative of unfair justice and that redress cannot be obtained through ordinary proceedings.

This Court has recognized the limited jurisdiction available by way of certiorari. Only fundamental questions of widespread importance should be considered:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished

> from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

The rules of this court also define the narrow limits of such review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. These rules set out the circumstances that must exist for a writ of certiorari to be granted.

In the present case, review is sought on two grounds set forth in Rule 10: 1) a United States court of appeal has entered a decision in conflict with another United States court of appeal on the same important matter, and 2) a United States court of appeal has decided an important question of federal law that has not, but should be, decided by this Court.

The Petitioner fails to satisfy the criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. A review of the authorities reveals the decision of the Tenth Circuit is in accord with the decisions of this Court and other circuit courts of appeal.

I

THIS COURT'S DECISION IN *COUNTY OF SACRAMENTO V.* IS APPLICABLE TO THIRD PARTY CLAIMS.

Petitioners seek certiorari for a determination whether *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998), is applicable to other drivers or bystanders injured as a result of a police pursuit. Their argument that this issue has not been previously addressed by this Court is incorrect.

The *Lewis* Court reasoned that deference must be afforded to an officer's exercise of discretion in pursuit situations. The Court recognized the dilemma of officers who must make split-second decisions about whether to pursue, when it stated, "the police on an occasion calling for fast action have obligations that tend to tug against each other." In such emergency situations, one must examine an official's opportunity for meaningful deliberations. Those deliberations involve competing interests. *Lewis*, 523 U.S. 833, 118 S.Ct. at 1720. The Court went on to explain those competing interests:

> A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and on the other, the high-speed threat to everyone within stopping range, **be they suspects, their passengers, other drivers, or bystanders**. *Lewis,* 523 U.S. at 833, 118 S.Ct. at 1720. (emphasis added)

The Court did not define the duty of the pursuing police officer with specific reference to the suspect being pursued. Rather, the Court defined those duties in terms of the public generally.

The *Lewis* Court again chose not to distinguish between suspects and other citizens in its cite to *Checki v. Webb,* 785 F.2d 534, 538 (5th Cir. 1986),

> Where a citizen suffers physical injury due to a police officer's negligent use of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's intentional misuse of his vehicle. *Lewis,* 528 U.S. at ____, n. 13, 118 S. Ct. At 1720, n. 13.

Subsequent to *Lewis,* the Ninth Circuit found:

> As we read the Court's opinion [in Lewis], if a police officer is justified in giving chase, that justification insulates the officer from constitutional attack, irrespective of who might be harmed or killed as a consequence of the chase. *Onossian v. Block,* 1999 WL 330260, *2 (9th Cir. May 26, 1999).

Although Petitioners cite *Feist v. Simonson,* 36 F.Supp.2d 1136 (D. Minn. 1999), it offers little support for their position. In *Feist,* the plaintiffs argued that *Lewis* did not apply to injured third parties. The district court acknowledged the issue had been raised, but stated that it was not necessary to address it.

Every circuit court since *Lewis* addressing this issue has extended its reasoning beyond the pursuit of suspected criminals. See, *Onossian v. Block*, --- F3d ---, 1999 WL 330260 (9th Cir. 1999); *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365 (9th Cir. 1998); *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998); *Medeiros v. O'Connell*, 150 F.3d 164 (2nd Cir. 1998); *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998).

II

THE CIRCUIT COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF THE *HELLER* DOCTRINE THAT MUNICIPAL LIABILITY ONLY EXISTS WHEN THERE HAS BEEN AN UNDERLYING CONSTITUTIONAL VIOLATION.

Petitioners assert there is a wide ranging conflict between the circuits regarding the direct liability of a municipality when a third party is injured but does not suffer a constitutional deprivation. Extant jurisprudence does not support this position.

This Court resolved the issue in *City of Los Angeles v. Heller*, 475 U.S. 796, 798-99, 106 S.Ct. 1571, 89 L. Ed. 2d 806 (1986). The *Heller* Court found a municipality could not be held liable under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 6ll, (1978), unless a person suffered a constitutional injury as the result of an officer's actions.

In *Heller*, issues pertaining to a policeman's individual civil rights misconduct were bifurcated for purposes of trial from a concurrent claim that the City of Los Angeles was

responsible for the officer's misconduct as a result of its police regulations. A jury was impaneled to determine the officer's liability. The jury determined that the officer had not violated the plaintiff's constitutional rights. Upon that finding, the trial court dismissed the concurrent claim against the City of Los Angeles, concluding that there could be no basis for the City's liability if the individual officer had not violated the plaintiff's constitutional rights. Reversal of this judgment by the Ninth Circuit Court of Appeals prompted a fairly blunt reinstatement of the trial court's decision by this Court:

> [T]his was an action for damages, and neither *Monell v. New York City Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point. *Heller,* 475 U.S. at 799.

In *Collins v. City of Harker Heights*, 503 U.S. 115, 124, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), the Court reiterated that an underlying constitutional violation must exist to impose liability on a municipality. Therein, the Court stated:

> The term [deliberate indifference] was used in the *Canton* v. *Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) case for the

> quite different purpose of identifying the threshold for holding a city responsible for the **constitutional torts committed by its inadequately trained agents**. *Id.* at 124. (emphasis added).

The Court went on to hold that since there was no underlying constitutional violation, liability could not be imposed upon the municipality under § 1983.

Every court of appeals decision except *Fagan v. City of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994)(panel opinion) is in accord with *Heller*. See, *Hayden v. Grayson*, 134 F.3d 449 (1st Cir. 1998); *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999); *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Leatherman v. Tarrant County*, 28 F.3d 1388 (5th Cir. 1994); *Smith v. Thornberg*, 136 F.3d 1070 (6th Cir. 1998);; *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994); *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992); *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996); *Myers v. Oklahoma County Bd. Of Com'rs*, 151 F.3d 1313 (10th Cir. 1998); *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996).

Petitioners place great weight upon *Fagan*. The *Fagan* panel, in a two to one decision, departed from established precedent. That panel stated:

> We decline to follow four other courts of appeals, which have suggested that a municipality can be liable for failure to train only if one of the pursuing police officers violated the Constitution. See *Temkin v.*

> *Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir.1989); see also *Medina v. City and County of Denver*, 960 F.2d 1493, 1499-500 (10th Cir.1992) (city can be liable if pursuing officers violate Constitution but escape liability because of qualified immunity); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364-65 (6th Cir.1993) (same), cert. denied, --- U.S. ----, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994). *Fagan*, 22 F. 3d at 1293.

The *Fagan* opinion has been criticized and rejected by other circuits.

In *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), the Court held that to prevail on a *Monell* claim, the plaintiff had to establish an underlying constitutional violation. The Court acknowledged the *Fagan* decision stating:

> Fagan attempts to distinguish *Heller* on the grounds that in *Heller*, the plaintiff was only seeking to hold the City of Los Angeles liable under a theory of respondeat superior. That cannot be the case since *Monell* expressly holds that there is no cause of action for respondeat superior liability against a municipal corporation under 42 U.S.C. Sec. 1983. *Monell*, 436 U.S. at 694-95, 98 S.Ct. at 2037-38. Thus we choose to follow the clear holding of Heller that "[i]f a person has suffered no constitutional injury at the hands of the individual police

officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573. *Thompson*, 33 F.3d at 860, n. 11.

In *Evans v. Avery*, 100 F.3d 1033, (1st Cir. 1996) the Court stated at page 1039-1040:

> In *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir.1994) (panel opinion), the court stated that "in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution." *Id.* at 1292. The court reasoned that the claim against the officers and the claim against the municipality were based on two different theories: the officers would be liable if their conduct "shocked the conscience," while the city would be liable if its policy makers, acting with deliberate indifference, implemented a policy that encouraged the officers to conduct an unsafe pursuit. *Id.* *Evans* invites us to adopt this analysis. We decline the invitation because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings. . .
>
> The *Fagan* panel described the "deliberate indifference" test as a "different theor[y]" for municipal liability, 22 F.3d at 1292, but the "deliberate indifference" test is not an independent theory at all. Rather, deliberate indifference is merely an articulation of the

> second prong of the *Collins* framework, adapted to "policy and custom" cases. In treating it as a separate theory, the *Fagan* panel ignored the first segment of the framework: the requirement that the plaintiff's harm be caused by a constitutional violation. (citations omitted) Consequently, we follow *Heller's* clear rule and hold that the City cannot be held liable absent a constitutional violation by its officers. *Evans*, 100 F.3d at 1039-1040.

Another Third Circuit opinion has also criticized the rationale of the *Fagan* opinion. In *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995) the appeals court said:

> [T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policy makers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the "deliberate indifference" prong of the *Collins* test, the panel opinion did not apply the first prong--establishing an underlying constitutional violation. *Mark*, 51 F. 3d at 1153, n. 13.

Petitioners set forth several cases they claim reach the same result as *Fagan*. However, those cases are distinguishable on their facts or have been misinterpreted by the Plaintiffs.

For instance, Plaintiffs rely heavily upon the cases of *Chew v. Gates*, 27 F.3rd 1432 (9th Cir. 1994) and *Hopkins v.*

Andaya, 958 F.2d 881 (9th Cir. 1991). In these cases the individual officers caused or could have caused a constitutional vioilation. In the present case, it has been determined that the individual officers did not violate the constitutional rights of the Petitioners.

In *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), the plaintiff cited *Chew* and *Andaya* for the proposition that a municipality could be held liable under §1983 notwithstanding a finding the individual defendants were found not to have committed a constitutional violation. The Ninth circuit rejected such an interpretation of those decisions. The *Quintanilla* Court found *Heller* dispositive and plaintiff had to show the individual officers violated his constitutional rights before the municipality could be held liable.

Plaintiffs also cite *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992). Citing *Heller*, the *Parrish* Court reiterated that municipal liability could not be imposed upon a finding that plaintiff's constitutional rights were not violated. *Parrish*, 963 F.2d at 207. The jury was required to answer special interrogatories. It made a finding the individual officer had violated the plaintiff's constitutional rights. In light of the jury's finding, the Court held municipal liability was not inconsistent. *Parrish*, 963 F.2d at 207.

The Eighth Circuit later examined *Parrish* in *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992). Finding the individual officers had not caused a constitutional violation, the *Robinson* Court held the municipality could not be held liable under §1983. The Court went on to say that, "Our recent decision in *Parrish v. Luckie* (citation omitted) is distinguishable because there the jury found that an officer had deprived plaintiff of her constitutional rights." *Robinson*, 972

F.2d at 977, n 3.

In support of their position, Petitioners claim the Eighth Circuit upheld a "verdict exonerating individual defendants but finding municipality liable" in *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986) (Pet. Br. at 22). The Court in *Praprotnik* actually stated:

> *Heller* is, however, distinguishable from the present case. Crucial to the result in *Heller* was the fact that the city's liability, if any, was solely derivative of the conduct of the named individual defendant. *Id.* **Here, persons other than the named defendants, namely, Thomas Nash and Robert Killen, effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury.** The failure of the jury to find the individual named defendants responsible for Praprotnik's damages can be justified by the fact that the named defendants were not the supervisors directly causing the lay off, when the actual damages arose. *Praprotnik*, 798 F.2d 1773, n. 3 (emphasis added)

The Petitioners next cite *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990). In *Gibson*, the appeals court reversed and remanded a decision in favor of the City because the plaintiffs did not have an opportunity to conduct discovery. The decision was based on the standards of Rule 12(b)(6). Later, in *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997) the same court, citing *Gibson*, held that finding the individuals had not violated the plaintiff's constitutional rights precluded a finding of liability on the part of the government.

The appeals court stated:

> A failure to train theory or a failure to institute a municipal policy theory requires a finding that the individual officers are liable on the underlying substantive claim. *Tesch*, 157 F.3d at 477 (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1522 (7th Cir. 1990).

The only other case cited by Petitioners that addreesses the same issue is *Hewitt v. City of Stanton, 798 F.2d 1230 (9th Cir. 1986)*. The Petitioners quoted from page 1233 of *Hewitt*, "The City could . . . be liable under *Monell* . . . even if [the individual officer] was exonerated, as long as [the officer] had in fact acted pursuant to municipal policy or regulation." In so holding, the Ninth Circuit relied upon its decision in *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985). The viability of the *Bushey* opinion is doubtful in light of the fact the Supreme Court granted certiorari and vacated that judgment in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L.Ed.2d 806 (1986).

III

CERTIORARI IS NOT APPROPRIATE TO REVIEW AN ALLEGED MISAPPLICATION OF THE LAW.

Petitioners request this Court to exercise its jurisdiction as a means to reweigh the evidence of this case presented to the district court and to the Tenth Circuit. Supreme Court Rule 10 states that "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." As stated

earlier this Court has recognized that a writ of certiorari is granted to resolve issues important to the public. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Petitioners' third reason is of interest only to the parties involved in this matter. There is no reason to depart from established practice in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: June 14, 1999

Respectfully submitted,

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